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**Before the
Federal Communications Commission
Washington, D.C. 20554**

**Federal Communications Commission
Office of Secretary**

In the Matter of)
)
Preemption of State and Local Zoning and)
Land Use Restrictions on the Siting,)
Placement and Construction of Broadcast)
Station Transmission Facilities)

MM Docket No. 97-182
FCC ~~Docket~~ No. 97-296

To: The Commission

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS
AND THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION**

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV"), by their attorneys, hereby jointly file the following reply comments in connection with the Public Notice, DA 98-458, released March 6, 1998, seeking comments on the applicability of National Environmental Policy Act ("NEPA") requirements in the above-captioned proceeding. The Notice was issued in response to a petition filed by the National Audubon Society ("Audubon") pursuant to 47 C.F.R. § 1.1307(c).

The Commission initiated this rulemaking proceeding because of the potential for state and local regulation to improperly interfere with and delay the siting and modification of broadcast towers and thereby frustrate the Commission's policy of promoting a swift conversion to digital television. To address this problem, the Commission, pursuant to a petition by NAB and MSTV, has sought comment on a proposed rule which would provide procedural and subject matter constraints on local decision making concerning broadcast antenna facility construction.

The gist of Audubon's argument and those of other commenters on Audubon's petition is that broadcast antenna facilities have significant adverse impacts on the environment, particularly on

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migratory bird populations; that state and local laws and regulations provide an important means of averting and reducing these adverse impacts; and that preemption of such regulations would constitute a “major Federal actio[n] significantly affecting the quality of the human environment,” which would require the Commission to prepare an Environmental Impact Statement (“EIS”) under NEPA.¹ In addition to its challenge to the substantive preemption of state and local environmental regulation, Audubon also argues that imposing time limits on state and local regulatory decisions affecting broadcast antenna facilities would preclude meaningful environmental review, which Audubon cites as another reason for the Commission to reject the proposed rule or prepare an EIS. The commenters also argue that, because of the potential impacts on protected species, under § 7(d) of the Endangered Species Act, the Commission must consult with the U.S. Fish and Wildlife Service (“USFWS”) before adopting the proposed rule.

As an initial matter it should be noted that although Audubon has requested the preparation of an EIS, the Commission’s rules envision that, where environmental issues need to be considered in Commission decision making, an Environmental Assessment (“EA”) will first be prepared. 47 C.F.R. § 1.1307. If, on the basis of the EA, the Commission finds that the proposed action will have a significant impact on the quality of the human environment, which cannot be eliminated by an amendment to the proposed action, an EIS must then be prepared. 47 C.F.R. § 1.1308. This approach is consistent with the rules of Council on Environmental Quality implementing NEPA. *See* 40 C.F.R. §§ 1500 *et seq.*

¹ 42 U.S.C. § 4332(C).

For the following reasons, neither an EA nor an EIS is required by NEPA in connection with this rule making:

- (1) The rule proposed by NAB and MSTV would have little effect on state and local decision making concerning environmental matters

The allegation of Audubon and other commenters that the rule making constitutes a major Federal action affecting the environment is founded on the assumption that such a rule would totally preempt state and local regulation of the environmental impacts of broadcast antenna facility construction.

This assumption is erroneous. As made clear in NAB and MSTV's reply comments filed in this proceeding on December 1, 1997, the proposed rule is not intended to preempt all state and local environmental regulations. To the contrary, and with the exception of the effects of radio frequency emissions, NAB and MSTV agree that state and local environmental regulations should not be categorically preempted by the proposed rule.

The proponents of an EIS in connection with this rulemaking proceeding completely ignore NAB's and MSTV's December 1, 1997, joint reply comments. In these comments, NAB and MSTV proposed a modified version of the proposed rule which would address the principal concerns of the state and local governmental commenters. The revised rule advocated by NAB and MSTV has the following elements:

- (1) Instead of requiring action on broadcast construction applications within the time frames originally proposed, NAB and MSTV advocate that state and local agencies be required to act "within a reasonable period of time," as defined with reference to the typical time that it takes the state or local agency to act on similar applications.
- (2) Substantive preemption should be limited to state and local regulation of any broadcast antenna facility on the basis of (i) the environmental or health

effects of radio frequency emissions, (ii) interference effects on telecommunications, and (iii) lighting, painting, and marking requirements, to the extent that such facility has been determined by the Commission to comply with its regulation in these areas.

- (3) Other state and local restrictions on broadcast antenna facility construction will be allowed except to the extent that they are not reasonable in relation to (i) a clearly defined and expressly stated health, safety or general welfare objective and (ii) the federal interests in the construction of broadcast transmission facilities and the fair and effective competition among broadcast media. Therefore, zoning, land use and environmental restrictions would not be categorically preempted.
- (4) State or local decisions to deny a request to place, construct or modify a broadcast antenna facility are required to be in writing and based upon substantial evidence in a written record.
- (5) Broadcast antenna facility disputes may be resolved through ADR procedures if both parties consent to such procedures.

Therefore, the proposed rule would not categorically preempt state and local regulation of the environmental impacts of broadcast antenna facilities.

The only case in which a state or local environmental regulation would be preempted under this proposal is where such a regulation is not reasonable in relation to some clearly defined and expressly stated environmental objective or does not reasonably accommodate federal interests in the advancement and delivery of telecommunications services. Where a state or local government relied on such a regulation to deny or condition the placement, modification or construction of broadcast facilities, the regulation and state or local action would stand, unless the applicant challenges the regulation in court or before the Commission.

Under this scenario, it is entirely speculative as to whether: (i) such a state or local action would occur; (ii) whether an applicant aggrieved by such action would petition the Commission for review; (iii) whether the Commission would find in favor of the applicant and preempt the state or

local rule on which the action was based; and (iv) whether the Commission decision in such case would in fact result in significant adverse impact to the environment. Thus, if the Commission were to adopt the proposed rule as modified, it is highly tenuous and uncertain whether any state or local environmental regulation would ever be preempted and whether any such preemption would significantly affect “the quality of the human environment.” NEPA does not require the preparation of an EA or EIS to address such highly speculative impacts.

With regard to the effect of time limits on state and local environmental review of broadcast antenna facilities, NAB and MSTV have suggested that the proposed rule be modified to delete the previously proposed definition of “a reasonable time” and to substitute a single time period that represents the typical experience of state and local governments. Alternatively, the Commission might define “reasonable time” to mean any finite time period for final decision making that is established by state or local law or regulation. Such a definition would go a long way toward addressing broadcasters’ concerns that they not be subjected to endless review procedures with no predictable time frame for decision making. At the same time, such a definition would also address the concern of state and local agencies that they be given adequate time to make decisions on broadcast construction applications.

In any event, the recommended procedural time constraint only would require state and local governments to act consistently with their normal procedures for reviewing and processing similar applications. Moreover, this constraint would only require that state and local governments act; it would not require that they act in any particular manner. Under these circumstances, any effect on the environment resulting from the application of the proposed time constraint is entirely too speculative to require environmental assessment.

For similar reasons, consultation with USFWS is not required prior to adoption of the rule as modified. The rule does not preempt state and local regulations concerning endangered species. Moreover, the rule does not require any particular decisions with regard to endangered species. Under these circumstances, the proposed rule's effect, if any, on endangered species is too uncertain and speculative to require consultation with the USFWS.

(2) The proposed rule would not have a significant effect on the environment

The proposed rule does not itself have any direct effect on the environment, as might a decision to construct, or permit the construction of, a bridge, dam, highway or broadcast facility. Nor does it indirectly affect the environment by invalidating state and local environmental regulations that might operate to prevent, or mitigate the impacts of, such construction. Rather, it creates a procedure whereby a project applicant can petition the Commission to challenge a state or local regulation on two very limited grounds: (1) that it is not based on a clearly defined and expressly stated objective; (2) or that it does not reasonably balance that objective with federal telecommunication interests.

Based on past experience, it is *certain* that state and local regulations *will* be applied to limit the construction of broadcast antenna facilities. However, at this point it is entirely uncertain whether an applicant would avail itself of the proposed procedure or whether, in such a case, the Commission would find in favor of the applicant. Moreover, it is impossible to know what environmental impacts might result from such a decision by the Commission, let alone whether they would be significant. Given this highly attenuated and uncertain chain of events, the Commission's adoption of the proposed rule does not constitute an action "significantly affecting the human environment" within the meaning of NEPA. *Cf., City of New York v. U.S. Department of*

Transportation, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984) (EIS not required where the *certain* consequences of agency action were not significant); *National Citizens Committee for Broadcasting v. F.C.C.*, 567 F.2d 1095, 1098 n.1 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (Congress did not intend to require preparation of an EIS to deal with “remote and speculative possibilities.”).

(3) The proposed rule does nothing to upset the balance struck by the Commission previously in adopting its environmental review procedures

The Commission's existing rules require a case-by-case assessment of broadcast construction applications for environmental impact. These rules are the result of a determination by the Commission that the environmental impact of its broadcast licensing scheme can only be determined through the evaluation of each particular application for the construction of broadcast facilities. If NAB's and MSTV's proposed rule, as modified, is adopted in this proceeding, the Commission's existing environmental review rules will continue to satisfy the requirements of NEPA.

The Commission's existing rules require, *inter alia*, that all radio broadcast services subject to Part 73 of the Commission's Rules be subject to routine environmental evaluation. *See generally* Part 1, Subpart I of the Commission's Rules, 47 C.F.R. § 1.1301 et seq. (Procedures Implementing the National Environmental Policy Act of 1969).² Pursuant to this evaluation, those broadcast facilities that are to be located in wilderness areas, wildlife preserves, or flood plains, or that may

² The Commission has also conducted a series of rulemaking proceedings, in further compliance with NEPA, that considered the effects of radiofrequency radiation on the human environment. *See, e.g.*, In re Responsibility of the Federal Communications Commission to consider biological effects of radiofrequency radiation when authorizing the use of radiofrequency devices, *Report and Order*, 100 FCC 2d 543 (1985); *Second Report and Order*, 2 FCC Rcd 2064 (1987); *Third Report and Order*, 3 FCC Rcd 4236 (1988).

affect threatened or endangered species or critical habitats, or whose construction will involve significant change in surface features require the preparation of an Environmental Assessment. *See* 47 C.F.R. § 1.1307(a). Similarly, antenna towers to be located in residential areas that are to be equipped with high intensity white lights also require the preparation of an Environmental Assessment. *Id.* This Environmental Assessment must include a significant amount of information on the environmental aspects of facility construction or modification, including a "statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect." 47 C.F.R. § 1.1311 (a)(2).

The rule advocated by NAB and MSTV would do nothing to disturb the Commission's existing determination of how its jurisdiction over broadcast towers intersects with the requirements of NEPA. The proposed rule does not require broadcasters to construct broadcast antenna facilities nor does it require state and local governments to allow the construction of broadcast antenna facilities. Instead, the proposed rule will only serve to prohibit endless delay in local decision making and to remove from discussion certain subject areas -- RF interference, human exposure to RF radiation, and tower marking and lighting -- which are already the subject of comprehensive federal regulation. Under these circumstances, the Commission's existing NEPA procedures will continue to satisfy NEPA's requirements.

CONCLUSION

For the reasons expressed herein, NAB and MSTV respectfully submit that the proposed rule under consideration in the NPRM, if modified as suggested by NAB and MSTV, would not

have a significant environmental effect and that the Commission therefore need not prepare an EA or EIS in this proceeding.

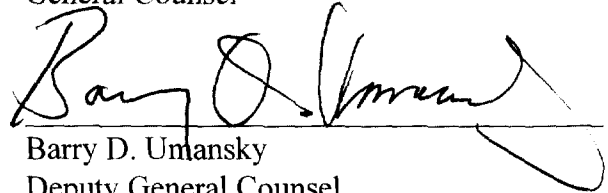
Respectfully submitted,

**NATIONAL ASSOCIATION OF
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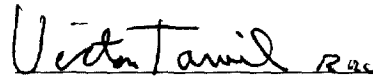
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